IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

CHAUNCEY S. TRUAX AND L. DEAN HOLDEN, Trustees of the Estate of Ravaud K. Hawley, Deceased, and RUSSELL A. ALGER,
Appellants,

vs.

L. EDGAR DILLER,
Appellee.

No. 116.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

Prior to the 30th day of April, 1883, the N. W. ¼ of N. E. ¼ and N. ½ of N. W. ¼ of section 13, and the S. E. ¼ of the S. W. ¼ of section 12, all in township 36 north, of range 3 east, Willamette meridian, in the county of Skagit, Territory (now State) of Washington, was surveyed public

land of the United States of America, and was subject to entry and purchase under the act of Congress of June 3d, 1878; that said land was then and there of the class and character subject to entry and purchase under the act of Congress of June 3d, 1878; that on said 30th day of April, 1883, one Henry C. Hackley, he having theretofore complied with all the requirements contained in the laws of the United States regarding the entry of public lands, and acquiring title to the same under said act, did, on said day, at the United States Land Office, in Olympia, Washington Territory, purchase said lands from the United States, and he did, then and there, pay to the receiver of said Land Office in lawful money of the United States, the sum prescribed by law as the purchase price of the same, and that he, the said Henry C. Hackley, did then and there receive a certificate or receipt from said Land Office, known as the final or duplicate receipt.

That thereafter said Henry C. Hackley, for a valuable consideration, sold, assigned and transferred said receipt or certificate, and the land therein described, to one Stephen S. Bailey, and did then and there make, execute and deliver to said Stephen S. Bailey a good and sufficient deed of warranty, granting and conveying said property to said grantee.

That thereafter, and on December 29th, 1887, said Stephen S. Bailey and his wife, for a valuable consideration, sold, assigned, and transferred all their right, title and interest in and to all of said above described property to Ravaud K. Hawley and Russell A. Alger, appellants, and did, then and there make, execute and deliver to said appellants a good and

sufficient deed granting and conveying all the interests of the said grantors in and to the above described property to said appellants, and that appellants, ever since said last mentioned date, have been the sole owners in fee in and to all of said above described property, and entitled to the legal title in fee thereto.

That thereafter, and on the 9th day of August, 1888, the Commissioner of the General Land Office suspended said entry of said Henry C. Hackley, and held the same for cancellation, and ordered the register and receiver of said United States Land Office at Seattle to notify said entryman and said transferees, said Stephen S. Bailey and appellants, of said action, and to notify them that they would be allowed sixty days from the date of said notice, with ten days additional, within which to apply for a hearing to show cause why said entry should be sustained.

There were eleven other entries suspended by the Commissioner of the General Land Office at or about the same time, which had theretofore been conveyed by the several entrymen thereof to the said Stephen S. Bailey, and by him and wife conveyed to appellants by said deed executed on or about December 29th, 1887; the register and receiver of said Land Office served notice of the action of said Commissioner upon each of said transferees, whereupon said transferees applied to the Commissioner of the General Land Office for a hearing, as required to do by the rules of practice obtaining in said Land Office; a hearing was ordered, and, upon the application of said transferees the said eleven suspended entries, and said suspended entry

of Henry C. Hackley were consolidated, and the same were heard, tried and determined as one cause.

That a hearing was had before the register and receiver of said Land Office commencing on or about the 27th day of August, 1889, and continued from day to day taking testimony therein until about the 26th day of November, 1889; the reasons assigned in the notice to said transferees for suspending said entries were, first, that the lands embraced therein were not chiefly valuable for their timber, and were valuable for agricultural lands; and second, that the entries were fraudulent for the reason that they were entered at the request and in the interest of said Stephen S. Bailey, transferee. The testimony submitted during said period of three months was exclusively directed to the question as to the character of the land, whether the same was timber or agricultural lands, and not one witness was placed upon the stand by the Government who testified or was asked to testify in relation to the said allegation of fraud.

The register and receiver of said Land Office were divided in their opinions in said cause, the register recommending the cancellation of some of said entries and the removal of suspension as to others thereof, and the receiver recommending the removal of suspension as to all of said entries and that the same be passed to patent. Said register and receiver considered said consolidated cause only upon the question as to the character of the land, both agreeing and deciding that there was no evidence submitted to substantiate the allegation that said entries, or any one of them, had been made by the entryman thereof in the interest or for the benefit of said Stephen S. Bailey or any other party.

That thereafter, said cause and all the papers and testimony therein were transmitted to the Commissioner of the General Land Office, neither party appealing, such being the practice obtaining in the land department upon a divided opinion by the register and receiver of a local land office. Application was made to the Commissioner of the General Land Office that said cause be set for argument before him at his office in Washington, D. C., which said motion was granted and notice served thereof upon the parties in interest. After consideration of the testimony submitted in said cause, the Commissioner of the General Land Office decided that the lands embraced in said twelve entries, including said entry of said Henry C. Hackley were chiefly valuable for their timber and unfit for agricultural purposes and properly enterable under said act of June 3rd, 1878; that each of said twelve entries, including said entry of Henry C. Hackley were properly made, upon proper proof, and were in all respects regular and conformed to the requirements of said act; that there was no proof submitted whatever to sustain the allegation of fraud, and ordered that said suspension be removed, and that said twelve entries be passed to patent.

The Government of the United States took no appeal from said decision of the Commissioner of the General Land Office, but the Secretary of the Interior, immediately after the rendering of said decision, ordered the Commissioner of the General Land Office to transmit the testimony and all papers in said cause to his office and to suspend further action thereon; said papers were transmitted, in accordance with said order, and remained with the Secretary of the Interior

for the period of nearly three years, when, under date of October 19, 1893, the Secretary of the Interior ordered the cancellation of said twelve entries, including said entry of Henry C. Hackley, upon the ground, and none other, that each and all of said entries were fraudulent in that they were made for speculation and in the interests of Stephen S. Bailey.

In accordance with said order, said twelve entries, including the said entry of Henry C. Hackley, were cancelled, and the said above described lands were thereafter held and pretended to be a part of the public domain of the United States, and subject to entry under the public land laws of the United States.

That said decision and determination was made by the Honorable Secretary of the Interior, only, and not as a member of a board composed of the said Secretary of the Interior and the Attorney General, as required by law in actions upon suspended entries.

That thereafter, and on the —— day of ——, A. D. 1895, said L. Edgar Diller, said appellee, offered and was permitted by the register and receiver of the United States Land Office at Seattle to make, and he did make, entry of said above described tract of land under said Act of June 3rd, 1878, and was permitted to make payment for the same as purchaser under said Act, and thereafter, and on October 15th, 1895, a patent was issued to him therefor by the United States.

Thereupon transferees brought their bill of complaint in the United States Circuit Court of the Northern Division of Washington, praying that said L. Edgar Diller be decreed

to convey to appellants the title to all of said above described lands, and for such other and further relief as to the Honorable Court shall seem meet and equitable in the premises.

Said cause was heard in said Court, and after full consideration of the evidence submitted, and of the arguments of the solicitors for the respective parties, said Court granted the prayer of said bill and entered a decree accordingly, whereupon said appellee appealed therefrom to the United States Circuit Court of Appeals for the Ninth Circuit, which said Court, after arguments of the solicitors for the respective parties, and consideration thereof, reversed the decision of the lower Court, whereupon said appellants appealed therefrom to this Court.

ASSIGNMENT OF ERRORS.

I.

The Court below erred in deciding that the Land Department had jurisdiction to cancel the entry of Henry C. Hackley.

II.

The Court below erred in deciding that the Commissioner of the General Land Office or any other officer of the Land Department of the United States had jurisdiction to pass upon charges of fraud or to consider them at all against the land entry of Henry C. Hackley.

III.

The Court below erred in deciding that under sections 2450 and 2451 of the Revised Statutes of the United States the consideration and adjudication upon the entry of Henry

C. Hackley could be considered at all by other than a board consisting of the Secretary of the Interior and the Attorney General.

IV.

The Court below erred in deciding that Ravaud K. Hawley and Russell A. Alger, respondents below, were not innocent purchasers for value received.

V.

The Court below erred in not deciding that under the act of Congress of June 3d, 1878, known as the timber and stone act, upon proof being made to the satisfaction of the local land office, it is mandatory upon the Commissioner of the Land Office to issue patent therefor.

VI.

The Court below erred in not finding and so deciding that said timber act of June 3d, 1878, recognized purchasers for value as innocent and *bona fide* purchasers, though the purchase is made before the issue of patent.

VII.

The Court below erred in deciding that the question decided by the Secretary of the Interior, in regard to said entry, was a question of fact, and therefore binding upon the courts, in that said decision of the Secretary of the Interior shows that said entry was cancelled by the Land Department on the ground of fraud, and fraud is not a question of fact.

VIII.

The Court below erred in finding and deciding that the Secretary of the Interior was justified in inferrring fraud.

IX.

The Court below erred in rendering judgment that the decree and judgment of the Court below be reversed, and directing the dismissal of the appeal, and ordering costs in favor of the appellants below.

POINTS AND AUTHORITIES.

I.

"The Court below erred in deciding that the Land Department had jurisdiction to cancel the entry of Henry C. Hackley."

Said lands described in said certificate issued to Henry C. Hackley by the receiver of the Land Office, ceased to be public lands of the United States and to occupy status of a part of the public domain, the moment that said certificate was signed by the receiver of the Land Office and delivered to said entryman.

Carroll v. Safford, 3d How., 460.
Simmons v. Wagner, 101 U. S., 200.
16th Fed. Rep., 349.
People v. Shearer, 30th Cal., 648.
Gwynne v. Niswanger, 15th Ohio, 368.
Smith v. Ewing, 23d Fed. Rep., 744.
Astrom v. Hammond, 3d McLean, 108.
Carroll v. Perry, 4th McLean, 26.
Hughes v. U. S., 4th Wall, 232.
Union M. & Co. v. Dangberg, 2d Sawyer, 454.
Witherspoon v. Duncan, 71 U. S., 210.

The foregoing authorities definitely establish that the

tracts of land in said certificate described became private property and private lands, and were severed from the mass of the public domain, upon the delivery of said final certificate.

Upon the issuance of said certificate of purchase, said purchaser had a vested interest in the land; said land was the private property of said entryman; said entryman had a full and perfect equitable title thereto. His title was more than an equitable title; it was a vested right to the immediate transfer of the legal title; he was entitled under the law to the immediate issuance of patent therefor; said land was taxable, as owned in fee simple absolute by said entryman. In the case of the death of said entryman before the issuance of patent therefor, the land described in said certificate would descend to his heirs as realty. Said land could be conveyed by said entryman by deed of warranty and transfer the title thereto to the same effect as if the patent had issued.

Wirth v. Branson, 98 U. S., 118.

Benson Mining and Smelting Co. v. Alta Mining and Smelting Co., 154 U. S., 248.

Deffenback v. Hawke, 115 U. S., 392.

Yosemite Valley Case, 15 Wallace, 77.

Johnson v. Townsley, 13 Wallace, 72.

Frisbie v. Whitney, 9 Wallace, 127.

Myers v. Croft, 13 Wallace, 291.

It is established beyond question by the decisions of this Court that the tracts of land bought and paid for and for which certificate is issued and delivered by the receiver of a United States Land Office, become, by said acts, then and

there, private property and private lands, and that the same are severed from the mass of the public domain. No officer of the Land Department is authorized by law to take any action or exercise any authority over private property of any description, and the authority of the Secretary of the Interior in regard to lands is limited to public lands:

"The Secretary of the Interior is charged with the supervision of public business relating to the following subject:

* * * * * *

"Second. The public lands, including mines."

Section 441 Revised Statutes of the United States.

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all exclusive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 453 Revised Statutes of the United States.

In some cases the effect of these decisions have been sought to be set aside by claiming that this Court meant that such status of lands only followed entry, payment and issuance of certificate when made by such entryman in good faith, and after full compliance with the spirit as well as with the letter of the law, this reasoning is plainly untenable, for who is to say or decide whether the entryman has acted fraudulently or against the spirit of the law under which his entry is made; not an executive branch of our Government

but the courts, for the land department of the United States is a branch of the executive department and exercises only such *quasi* judicial functions as are expressly conferred by law, and that authority has been exercised to its full extent when proof and payment have been offered, received, acted upon and a decision favorable to the entryman reached, and the same evidenced by the issuance of a final certificate. Anything further in relation to said entry, other than may appear upon the face of the papers transmitted by the local officers to the Commissioner of the General Land Office, over which only the Commissioner has supervisory powers under the law, such as questions of intent, fraud, etc., and requiring the institution of a new proceedings to establish, is entirely within the jurisdiction and authority of the judiciary.

The Courts uniformly decide that the only thing to be done by the officers of the Land Department after the receipt of the money and the issuance to the entryman of the duplicate receipt is a "mere ministerial act," which necessarily precludes the idea of jurisdiction existing in said officers to hear, try or determine any question of fact, not shown upon the records of the Land Office nor in the proceedings or proof pertaining to the entry.

"A ministerial act is an act performed in a prescribed manner in obedience to the law or the mandate of legal authority without regard to or the exercise of the judgment of the individual upon the propriety of the acts being done."

Section 658, Mechem on Public Officers, and notes.

Butterworth v. United States, 112 U. S., 67.

II.

"The Court below erred in deciding that the Commissioner of the General Land Office or any other officer of the Land Department of the United States had jurisdiction to pass upon charges of fraud or to consider them at all against the land entry of Henry C. Hackley."

The Land Department of the United States is not endowed with any authority of law to institute an original proceeding before any of its officers for the purpose of trying and determining whether or not fraud has been committed by any person in relation to any contract or any subject. The question as to the guilt or innocence of a party charged with fraud is a purely judicial question, and can be tried and determined only in the Courts of the United States.

Hughes v. U. S., *supra.*

Moore v. Robbins, 96 U. S., 522.

An action the object of which is the cancellation of a contract or a written instrument upon the ground of fraud, is cognizable only in a Court of Equity; the proceeding instituted in the Land Department in this cause was for the cancellation of an instrument issued by authority of law and after proceedings regular upon their face upon the ground of fraud committed by said entryman, and the end thereof and the purpose for which such proceeding was instituted, was to deprive a citizen of that which the Courts uniformly declare to be his private property.

The Constitution of the United States contains the following provisions:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." * *

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." * * *

"No person shall be held to answer for a capital or otherwise infamous crime unless * * * nor shall he be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty or property without due process of law." * * *

The action of the Land Department in instituting a proceeding for the cancellation of the entry involved in this cause, the taking of testimony, the consideration of the same, and the passing of judgment, was an attempted exercise on the part of said Department of judicial powers; as alleged in the bill, the proceeding instituted was called a cause or action, and entitled by the Department "The United States v. Henry C. Hackley, Stephen S. Bailey et al.;" it was commenced by said Department by issuing a summons directed to said entryman and to the transferees mentioned, directing them to appear before the Land Department of the United States within sixty and ten days from the date of summons and show cause why said entry should be sustained, under penalty upon their failure so to do of judgment being passed against them, the effect and nature of which judgment would be the final cancellation of said entry, and the forfeiture of the money to the United States of all moneys paid as fees and the purchase

price of said land; in order to show cause why said entry should be cancelled it was absolutely necessary for the Government of the United States to secure the attendance of witnesses before said Land Department, and in order to rebut their testimony it was equally necessary for the transferees to secure the attendance of witnesses; it involved the necessity of the examination and cross-examination of witnesses, and the consideration of the testimony by them submitted on the part of the officers of the Land Department of the United States; it was in its very nature a judicial proceeding and an attempted exercise of judicial power.

The language used in the third article of the Constitution in the distribution of powers to the legislative, executive and judicial branches of our Government is mandatory, and it is not within the province of Congress to confer powers of the one branch upon another.

Martin v. Hunter's lessee, 1st Wheaton, 327.

"Private rights may be interfered with by either the legislative, executive or judicial department of the Government. The executive department must in every instance show authority of law for its action, and occasion does not often arise for an examination of the limits which circumscribe its powers."

Section 436, Cooley's Const'l Limitations.

Due process of law, as used in the Federal Constitution, means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there

must be a tribunal competent by its constitution, that is, by the law of its creation, to pass upon the subject matter of the suit.

Pennoyer v. Neff, 95 U. S., 714.

In order that the legal proceedings may be according to the rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights, the tribunal must have authority to issue compulsory process to secure the attendance of witnesses, and the further power to issue attachment and punish for contempt.

United States v. Williams, 4th Cranch's Cir. Ct., 385.

The Land Department of the United States has no power to compel the attendance of witnesses, issue attachments or punish for contempt.

See decisions by Secretary Noble, dated July 20th, 1889.

Volume 9, Public Land Decisions, pages 133 and 134.

"It cannot be said in this case, as in the case of Budd, that the Government had the right to cross-examine the transferee or the entrymen, because none of them were produced as witnesses at the trial, and there was no power on the part of the Government to compel their attendance. Their testimony could only be obtained by their voluntary appearance and offering themselves as witnesses, which no man is willing to do when his testimony, truthfully given, will show that he has obtained valuable property in violation of law. The

case of Budd was tried in court, where those unwilling could be compelled to appear and give their testimony."

Record, pages 77 and 78.

Here was a case involving property rights of the value, to appellants, of more than One Hundred Thousand Dollars, and yet the tribunal before which the pretended trial is had confesses itself to be without power to secure the attendance of witnesses on behalf of the Government, and it was equally powerless to compel the attendance of witnesses desired by appellants; yea, more, it was without the power to maintain order during the hearing, or to compel a witness to answer questions, should he desire to refuse to do so.

There is no provision of law whereby an executive officer can commence an action in the name of the United States as plaintiff, for the purpose of setting aside or annulling any of its contracts, its obligations or its most solemn instruments, such action to be heard and determined before such executive officer or some member of the same department, as was done by the Commissioner of the General Land Office in relation to the entry under consideration, and were such law passed by Congress attempting to give authority, such law would be unconstitutional and void in that it would be an attempt to confer upon an executive branch of the Government powers exclusively belonging to the judiciary under the Constitution of the United States; because it would authorize a proceeding the object of which would be to deprive a person of property without due process of law, which is contravention of Art. V., Amendments to the Constitution of the United States.

"If the United States in any particular case has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations or its most solemn instrument, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States."

United States v. San Jacinto Tin Co., 125 U. S., 273.

We are well aware that this Court has, in some cases, decided that the Land Department has authority to cancel an entry after the issuance of a final certificate; but we maintain that no such decision has been given by this Court under such facts and circumstances as are presented in the cause at issue, nor do we recall any case which has been considered by this Court from the standpoint of constitutional rights. Many supposed this practice of the Land Department to be very ancient, but such is not the fact; a carefuwl examination of the reports of the decisions of the Department of the Interior discloses the fact that prior to the year 1880, but one case is reported in said Department with the title of the United States as plaintiff, and that one was the United States v. the State of Oregon. From 1880 until 1885 such action was very infrequent, and it was only upon the accession to office of William A. J. Sparks, as Commissioner of the General Land Office in the year 1885, that such actions became in any way common. It is needless to call the attention of this Court to the insane desire of said Commissioner to cancel all entries of every kind and description which he found pending in his department or which were made during his incum-

bency, or to the fact that under his order not a single patent was issued for any entry of public lands of the United States for a period of about one year, and until his non-administration and execution of the laws governing him and his department became so intolerable to the people of the public land, states and territories, that, in response to their universal complaint, the Honorable Secretary of the Interior requested and obtained his resignation, for all this is matter of history with which, no doubt, this Court is familiar; but he left a legacy of suspicion and distrust among the working force of said Department which has culminated in a sort of emulation among the staff thereof, as to which can cause the cancellation of the greatest number of entries, and that irrespective of all questions of law, right or justice. We are told in some of the decisions of some of the courts that were questions of fraudulent entries of public lands of the United States to be tried in the Courts, the expense and delay would be too great; in answer to this we will say that the question of expense and delay, were such a fact, have no right to be considered when opposed to the constitutional rights of citizens, and further, that the delay and expense attendant upon a hearing in the Land Department of the United States is in all cases at least double and in some cases ten-fold the expense and delay incident to a trial of the same cause in our Courts.

We therefore conclude that the Land Department of the United States exceeded its jurisdictional powers in suspending said entry, in ordering said hearing, in taking testimony therein and considering said testimony, and therefore that

the cancelling the entry of said Henry C. Hackley was a void act, and that L. Edgar Diller, appellee, acquired no right by reason of his said entry and the issuance to him of said United States patent, that is not subject to the paramount rights and equities of appellants.

III.

The Court below erred in deciding that under sections 2450 and 2451 of the Revised Statutes of the United States the consideration and adjudiction upon the entry of Henry C. Hackley could be considered at all by other than a board consisting of the Secretary of the Interior and the Attorney General.

There are two modes of attacking an entry after the issuance of duplicate receipt or final certificate recognized and provided for by the practice of the Land Department of the United States; one is by contest, which is instituted by a citizen claiming some interest or right in the land, and by making such interest or claim known to the Land Department by means of affidavit of himself and of one or more corroborating witnesses; the other is by suspension, which is always initiated by the action of the Commissioner of the General Land Office, and is presumably done, in all cases in the interest of the United States. It is admitted that the case at bar was a suspended entry, and in the event that Congress has specifically provided that cases of suspended entries of public lands should be submitted and subject to a certain and defined line of procedure, and should be subject to the decision of certain named officers, we claim that any departure from such prescribed rules would vitiate and render null any decision or order which

might be made against any such suspended entry. Section 2450 of the revised statutes of the United States reads as follows:

"The Commissioner of the General Land Office is authorized to decide upon principles of equity and justice as recognized in Courts of Equity, and in accordance with regulations to be settled by the Secretary of the Treasury, the Attorney General and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land claims, and to adjudge in what cases patents shall issue on the same."

Section 2451, Revised Statutes of the United States reads as follows:

"Every adjudication shall be approved by the Secretary of the Treasury and the Attorney General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants."

Section 2452 directs the Commissioner to report to Congress the adjudications made; section 2453 directs the Commissioner to arrange his decision into two classes; the first class to embrace all such cases as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid; section 2454 provides that patents shall issue to the claimants for all lands in the first class, and that all lands in the second class shall revert to and become part of the public domain.

Section 2457 Revised Statutes reads as follows:

"The preceding provisions, from section twenty-four hun-

dred and fifty to section twenty-four hundred and fifty-six, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land Office since the twenty-sixth day of June, eighteen hundred and fifty-six, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim."

Sections 2450-2455, inclusive, were first enacted by Congress August 3rd, 1846, with a limitation of two years, in 1848 were continued for one year and were subsequently reenacted without limitation as to time and became a portion of the revised statutes of the United States. Section 2456 was passed March 3rd, 1853, and section 2457, June 26, 1856. It will be observed that the history of this law shows that Congress must have entertained grave doubts as to the advisability of conferring this power upon said officers, and its passage took from the officers of the Land Department any and all right of action upon suspended entries, which it might previously have had in cases of suspended entries, under general supervisory powers.

It is true that the Land Department has acted under this law only in creating what it calls a board of equitable adjudi-

cation to which it has submitted such cases as are mentioned in the last clause of section 2457 thereby limiting and abridging said law to cases which necessarily fall within the first class provided for in section 2453, evidently interpreting said law to cover only such cases of suspended entry as must be necessarily approved; that such is not the intent of the law and could not have been intended by Congress so to be is shown by the evident caution of Congress and its hesitation in making it a permanent law, for the class of cases provided for by said clause should evidently be all confirmed and the power so to do could work no injustice to either the Government or the individual; that such limitation was not intended is further shown by the fact that said law is made specifically applicable to all suspended entries, either then pending or which might in the future arise; that such limitation was not intended is further shown by the fact that Congress directs not only the report of confirmed entries, but also of rejected and cancelled entries, and were such cases limited to those specified in said last portion of section 2457 the provision for the second class provided for in section 2453 would be wholly inoperative.

We are aware that great respect is shown by the Courts and due consideration given of the construction placed upon laws by the officer whose duty it is to carry the same into effect, but this Court has uniformly refused to recognize and follow the construction and interpretation of laws by the heads of the several executive departments where such construction and interpretation is manifestly erroneous.

"The practice or opinion of the Land Department can in

no manner control the opinion of the Court; the Court must decide according to the law."

Irvine v. Marshall, 61 U. S. 558.

In the case of Foley v. Harrison, 56 U. S., 433, the Defendants claim title under five patents issued from the General Land Office on the 1st of September, 1847, and purported to be issued under said Act of Congress of August 3, 1846, and were founded upon locations made by Defendants, receipts issued therefor, and subsequently suspended by the order of the Commissioner of the General Land Office. The Court in its decision recites the fact of suspension, the fact that the same were considered and patents issued under said Act of August 3, 1846, and cites, in general, the provisions of said Act; the fact that the Commissioner reported that said entries had been heretofore suspended and that they have been adjudicated by him and placed in the first class under the Act of August 3, 1846; that the report was agreed to by the acting Secretary of the Treasury and the Attorney General. In deciding in favor of the Defendants after the above recitations the Courts say:

"As this decision was made by a special tribunal, with full powers to examine and decide; and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law." * * * * * * *

"And these were the entries included in the above report of the Commissioner of the General Land Office, and sanctioned by the Secretary of the Treasury and the Attorney General."

Can it be supposed that the Court would have given valid-

ity to these patents, in the event that the report of the Commissioner of the General Land Office had been approved by the Secretary, or by the Attorney General alone? Said law requires the Secretary and the Attorney General to approve the decision of the Commissioner acting as a board.

We therefore conclude that if the entry of Henry C. Hackley was a suspended entry, the Secretary of the Interior had no authority of law to reverse the decision of the Commissioner of the General Land Office, and that said decision of said Commissioner could be reversed only by the Secretary of the Interior and the Attorney General so deciding, acting as a board.

We claim that said act of June 3d, 1878, protects *bona fide* purchasers of timber entries from an entryman under the provision contained in the latter portion of said Act:

"And any grant or conveyance which he may have made, except in the hands of *bona fide* purchasers, shall be null and void."

Said timber entry of Henry C. Hackley was made and perfected in April, 1883, and the other eleven entries were all made during the spring and summer of said year; more than four and one-half years thereafter, during which time nothing had been done to cast any suspicion upon said entries, these appellants bought all of the land embraced in said entries. There was no attempt on the part of the Government at any stage of the proceedings in this cause to even cast a suspicion upon the good faith of these appellants throughout this transaction. The Honorable Secretary of the Interior, in his opinion, says:

"There is no charge, nor is there any testimony affecting the transaction between Bailey and Alger and Hawley."

V.

"The Court below erred in not deciding that under the Act of Congress of June 3d, 1878, known as the timber and stone Act, upon proof being made to the satisfaction of the local Land Office, it is mandatory upon the Commissioner of the Land Office to issue patent therefor."

Section three of said Act, after providing for posting and publication for a period of sixty days and no adverse claim being filed, states that the applicant shall furnish to the register of the Land Office satisfactory evidence, first, that the notice of application was duly published as herein required; second, that the land is of the character contemplated in the Act, unoccupied and unimproved, and that the same is non-mineral; and upon payment therefor the purchase money and fees, that the applicant be permitted to enter the tract, "And on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon; *provided,* that any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands held by him, stating the nature of his claim thereto;" then follows provision for the taking of evidence on said objection.

The language used is unambiguous and mandatory; it says that patent *shall* issue, and the only exception stated in the Act is in the event of some person filing a claim in writing asserting an interest in the land. There is no claim that such was done in this cause. All the proceedings shown by the

papers transmitted were in strict compliance with the law; the proofs submitted were satisfactory to the officers to whom was delegated, by Congress, the authority to pass upon the same; it was claimed that the land embraced in this entry was not of the class and character contemplated by said Act and not properly enterable thereunder, and the hearing was had solely upon this question and the decision of the Secretary of the Interior finds for the entryman and transferees upon this point.

(See Record, page 71, opinion of Secretary).

For proceedings and proof submitted in the original entry of said claim see Exhibit —C—, Record, pages 60-68, inclusive.

The issues presented in the notice to transferees of the hearing before the Land Department, which was in the nature of a complaint against said entry of Henry C. Hackley and said eleven other entries were first, that said entries were made in the interest of third parties, and, second, that the land was agricultural in character and not subject to entry under the Act of June 3, 1878.

Record, page 70.

These two matters were affirmed by the Land Department and the burden of proof was upon the Government; that this was so considered is shown by the fact that in this cause, as in all others of similar nature in the Land Department, the Government opened the case by introducing witnesses to substantiate the allegations of the complaint. During the entire three months consumed in the hearing no witness was introduced on behalf of the Government to support the first allegation. and the attorney for the Government repeatedly stated to coun-

sel for app ellants during said hearing, that he could not prove and did not intend to try to prove the allegations of fraud. Exhibit "D," Record, pages 68-80, inclusive, recites the occupations and residence of a number of these entrymen, showing that they were available as witnesses and could have been produced by the Government upon the witness stand had not the counsel for the Government ascertained by inquiry that the evidence of each of said witnesses would have been antagonistic to the Government. What is disclosed as to the character, occupation and standing of these men who are accused of entering into a scheme to enter lands fraudulently, and who are accused of committing perjury in furtherance of their fraud? We find it stated that Wayne W. Holcomb is an attorney at law and had been representative in the Legislature from Yakima County, Washington; that Edwin L. Chalcraft was a civil engineer in Seattle; William Gilmore was a merchant at Edison, Skagit Count, in said State; Henry McBride was a school teacher and now an attorney at law; Henry Brandon was engaged in driving a delivery wagon for Schwabacher Bros. of Seattle; that Edward Crome was an assistant surveyor; that Winfield S. Wilson was engaged in a restaurant in Seattle; that Henry C. Hackley assisted in surveying, and was afterwards a contractor on a road near Lake Washington; that William L. Rogers was a farmer at Edison, and John L. Leslie worked in a barrel factory in North Seattle.

Record, pages 73 and 74.

It is a fact well known to the counsel for the Government, at the time of the hearing in Seattle, that Wayne W. Holcomb was then practicing law in the City of Seattle where said hear-

ing took place; that Edwin L. Chalcraft was then in the employ of the Government as a school teacher upon the Puyallup Indian Reservation, within twenty-five miles of the City of Seattle; that William Gilmore was a merchant at Edison, and conducting his business within twenty miles of the land in dispute; that Henry McBride was then practicing law at La Connor, Skagit County, Washington, and of sufficiently good standing to be elected Judge of the Superior Court of his County for two terms immediately succeeding the admission of the State; Henry C. Hackley's whereabouts at that time is shown by his testimony, pages 41-54, inclusive, Record. The other entrymen were shown to be honest, hard working men. It seems to us, and we think it will seem to this Court, a monstrous act of injustice that men of such standing should be branded as perjurers and frauds by the Secretary of the Interior without one word of testimony before him upon which to found his judgment, and solely as his inference, drawn from the fact that they sold lands entered by them at a time that the law, and decisions of this Court declare that they had a right to sell.

"The Government offered no testimony in chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the records, showing dates of said entries and transfers thereof."

Record, page 71.

The Secretary in said Decision says:

"This holding in nowise conflicts or interferes with the right of a purchaser in good faith of land under the Act, after he acquires title, to sell the land if he desires so to do. Sales

made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made it was not for the entryman's own exclusive benefit and use."

Record, page 76.

That is, the Secretary of the Interior in this cause decides that while the entryman after payment and receipt of a certificate has a right to sell the land embraced in his entry, no person has a right to buy the same, and if he does buy, and some agent of the Government reports that the entry was fraudulent, without a word of testimony to substantiate that allegation, the entryman must produce himself as a witness before the Land Department and under oath disclose to said Department the motives which prompted him, years before, to make the application to purchase the land, and this under penalty upon failure so to do, of being branded as a perjurer and guilty of a felony, and his transferee must lose that which he honestly bought and paid for.

One of the greatest surprises, however, in this cause was the decision of the Secretary of the Interior, apparently sanctioned by the United States Circuit Court of Appeals for the Ninth Circuit, that notwithstanding the Government had accused the entrymen of crime, had wholly failed to introduce a scintilla of evidence to substantiate that allegation, because the entrymen were not introduced as witnesses to prove their innocence, they were therefore guilty. We had supposed that the presumption of law of the innocence of the entrymen was absolutely conclusive, until that presumption was in some degree rebutted by evidence; we had supposed that when action was

brought in any court the allegation against the defendant must be proved, before the defendant could be called upon to rebut such allegation. The lower Court holds that the Secretary of the Interior in considering this cause had a right to infer fraud, Record, page 97; to our mind he would have had equal right to infer the entrymen guilty of any or all the crimes mentioned in our statute books, for this is the first instance that we have ever seen or heard of, where any judicial officer undertook to pronounce a man guilty of crime, without any testimony in relation to such crime, or that any crime had been committed, and upon evidence submitted upon an entirely different subject.

The Secretary of the Interior seeks to evade the force of the decision in the case of the United States v. Budd (144 U. S., 154), but his effort is entirely unsuccessful; the last cited case was decided by this Court immediately after the Commissioner of the General Land Office had rendered his decision in this cause, and the Court will recall that said case reversed the practice which had obtained in the Land Department in the classification of lands as timber or agricultural, holding, in effect, that lands in a state of nature, more valuable for timber growing thereon than for agricultural purposes, were enterable under the Act of June 3, 1878, notwithstanding the soil might be capable of raising crops after such land was cleared and reduced to a state of cultivation; the decision in this respect was so clear and so evidently in accordance with the intention of Congress, that the Land Department recognized the fact that it would be impossible, under the testimony submitted in this cause, for it to cancel the entries before it for consideration, without having its decision set aside by the

Courts; as hereinbefore stated, about three years elapsed before this decision was promulgated, and we think that this Court after reading the opinion of the Secretary cancelling the twelve entries, will agree with us in the opinion that if this Court had not established the law as to timber and agricultural lands, nothing would ever have been heard from the Department regarding the fraud of these entrymen.

The Secretary of the Interior attempts to found his decision in part upon the testimony upon cross-examination of J. Theodore Lohr, a witness introduced by the transferees.

Record, pages 73-76, inclusive.

The Honorable Secretary in his said opinion in said cause quotes very freely from the testimony upon cross-examination of this witness, inserting in the opinion everything said by said witness that could be warped into anything seemingly damaging to the interests of these appellants; but upon reading these quoted statements the Court will find that this witness testified in regard to every one of said twelve entries, that the entryman, so far as witness knew, had made no contract or agreement, either oral or in writing, whereby the title to the land he sought to acquire from the Government was to inure in whole or in part to the benefit of any person except said entryman; that no one of said entrymen, to his knowledge, had given any mortgage or other security upon the land entered; that each and every one of said entrymen was perfectly free to keep his land or sell the same, at his pleasure, after perfection of entry; that in no instance did he secure a promise, or attempt so to do, from any one of said entrymen, that such entrymen should sell to him, Lohr, or to any one else. Lohr was one of a class

of men numerous in the public land states and territories known as cruisers, whose business it is to inform themselves of the location of Government lands, whether agricultural or timber in character, and to sell the knowledge acquired to persons desiring to enter public lands, and who have not the time to make investigation for themselves. It has always been the practice of people following this calling to make exertions to find people who desire to enter lands and thus obtain a purchaser for their stock in trade, to-wit, the knowledge of lands aforesaid. Lohr's testimony discloses the fact that he did what any one of his calling would have done in the premises, and we have never heard that this calling was other than legal, just and honorable. It is as he said in his testimony, he negotiated the purchase of these claims, after consummation of entry as he would have negotiated the purchase of any other claims; these entrymen were under no manner of obligation to sell through him, or at all, any more than the entryman of any other tract of land would be.

The process of reasoning by the Secretary of the Interior in arriving at his decision, when stripped of verbiage, is as follows:

The Government charged fraud; the Government submitted no testimony whatever to substantiate the charge; the entrymen failed to present themselves as witnesses to swear that they were innocent, therefore they were guilty; the entrymen sold the land, embraced in their entries, after they had perfected the same, as they had a perfect right to do, therefore they are guilty; a witness was introduced by the defendants, appellants, who was questioned, on cross-examination, by the

Government as to whether or not these entrymen or any one of them made his entry for the benefit of any other person than himself, to which question the answer is, no, but that as far as witness knows each entry was made strictly in compliance with the law, *therefore,* each and all of said entrymen are guilty of fraud and perjury; and then, as though not satisfied with the conclusiveness of his reasoning, he adds that he *infers* that each of these entrymen is guilty of fraud and perjury and that each of said entries shall therefore be cancelled. We know the rule of the courts which takes as conclusive findings of fact made by an executive officer, but we claim, first, that the question of fraud is a mixed question of law and fact; secondly, that in a case like the one at bar, where the decision itself shows that the finding has no evidence upon which to base it, that the Court will not find or hold such finding as conclusive. It seems to us that if there ever was a case decided in an arbitrary manner by the Land Department of the United States, this is one, and would come fully under the remarks in regard to the arbitrary and unlimited actions on the part of the Land Department used by this Court in Cornelius v. Kessel, 128, U. S., 456.

In endeavoring to evade the force of the opinion of this Court in United States v. Budd, *supra*, the Secretary endeavors to draw a distinction between the evidence required to set aside or cancel a patent and that required to set aside a final certificate, condemn a person as a perjurer and forfeit his money; we cannot but regard his argument in this respect as illogical, and based upon a misinterpretation and misconstruction of the law. He endeavors to draw a further distinc-

tion in that in the Budd case the allegation of the complaint was that the entry was made under an agreement to sell the land entered by him in violation of the statute, and that it was not charged in said complaint that he had applied to purchase said land on speculation, and therefore no evidence could be submitted by the Government in the Budd case to show that the entry was made on speculation; but the allegation against the entry now under consideration was identical with the allegation against the Budd entry, and nothing was ever heard of the question of speculation in any of the proceedings in this cause until said opinion of the Secretary was promulgated. But what is meant by the term "speculation" in said Act? The Act in this particular reads as follows: "That he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit."

Section 2, Act June 3, 1878.

Does this mean that if a man enters land under said law with the expectation and intention of bettering his financial condition, by holding the same for an indefinite period, by cutting the timber therefrom and selling it, or by selling it when he has a right so to do, that he is guilty of fraud under the law? We think not, for as an antithesis to the term speculation, we find the phrase "But in good faith to appropriate it to his own exclusive use and benefit," which we understand to mean that the proceeds of the land so entered, however, or whenever produced, after final entry, shall belong to and be the property of the entryman himself. If it means other than this we will venture the assertion that there has never been a valid entry made under said law.

We would respectfully call the attention of the Court to the testimony of Stephen S. Bailey submitted in this cause, Record, pages 29-41, inclusive, and to the testimony of the entryman, Henry C. Hackley, Record, pages 41-54, inclusive. The testimony herein submitted by these witnesses carries conviction of the honesty and good faith of the transactions in relation to the lands above described upon its face. The Court may say that this litigation would have been useless had this testimony been submitted in the Land Office, and that appellants are guilty of laches in not producing the same at the hearing; but for reasons heretofore given we did not and do not now consider that the introduction of witnesses to prove innocence would have been proper or in any event can be necessary, in the absence of proof of guilt.

The Honorable Secretary in his said opinion says:

"On the other hand, if these men made their entries for their own use, and not on speculation, or in collusion with Bailey, there was every inducement on his part to call upon them, and every moral obligation on their part to respond. They were peculiarly his witnesses."

Record, page. 78.

The Secretary in the foregoing assumes the guilt of Bailey and the entrymen in inferring that said entrymen were under the control of Bailey; this is shown from the fact already herein quoted from said opinion, that the Government was powerless to secure the attendance of witnesses at the hearing; what power greater than that possessed by the Government had Bailey or appellants to secure the attend-

ance of witnesses, unless the assumption of the Secretary was correct? In any event, we cannot comprehend why witnesses should be called to rebut anything concerning which no testimony had been submitted. He speaks of the damaging disclosures of Lohr, but we deny that Lohr made any damaging disclosures, for his testimony before alluded to and quoted by the Secretary is direct and positive in denying and refuting the charge that these entries were made at the instance of or for the benefit of said Bailey or any other third party. Bailey's acquaintance and connection with said entry of Henry C. Hackley is shown in the Record, pages 29 and 30; as to whether Mr. Lohr was to locate these men, given upon cross-examination by appellee's solicitor, Record, pages 38-40, inclusive.

It appears from the testimony of Bailey (Record, page 32) that he purchased fifteen or sixteen claims through Mr. Lohr, but there is no evidence as to any action ever taken by the Government in relation to the remaining three or four claims; there is no doubt but that Mr. Lohr showed many other claims to other entrymen during the year 1883, for this was a period of great activity in the entry of timber lands in this section of country, thousands of claims being entered during that year in the Puget Sound Basin. This was caused by the activity of purchasers of timber lands, and during this period the purchaser was obliged to act quickly and consummate his purchase as soon as possible after entry in order to secure what he desired. This explains the reason why so many entries were purchased immediately or soon after the issuance of the final certificate, and we are safe in the assertion

that the great majority of all entries made under said law were so purchased. We are well aware that many entries have been made under the timber law, and are still being made in all probability, by persons in the employ of, and upon the solicitation and for the benefit of mill companies and large capitalists; but we have never known, and we think the Court has never known of instances where this has been done by contractors, surveyors, lawyers, members of legislatures and men following honest and legitimate labor for a livelihood; the evident standing of the men who made these entries should have been sufficient to have made the Honorable Secretary of the Interior hesitate before branding them as frauds and perjurers, and we claim that had Lohr's testimony been direct and positive that each had made an agreement to sell his claim before entry, that his unsupported testimony would have been insufficient to overcome the presumption of innocence, for we further claim that the fact of transfer soon after entry not only requires no explanation, but that no one has a right to demand an explanation, for in transferring at the time they did they did what they had a right to do under the law, under the decisions of the Land Department, and under the decisions of this Court, and an act legal, just and right cannot be taken and should not be considered as evidence of a crime.

In the discussion of this question we may have used language that will seem strong in animadverting upon the action of the Honorable Secretary of the Interior, but we have done so without intention of disrespect to that high office or to the honorable person who occupied the same when

his name was appended to this decision, for we well know, as the Court know, that the duties cast upon the occupant of that office are so very great that his personal attention is not given to the thousandth part of the business ostensibly before him, and decisions bearing his name; we well know the hundreds of cases every month in the Land Department which he is supposed to decide; we know the many questions that are under his supervision as Chief of the Indian Bureau; we recall the questions arising in the patent office, as well as the army of clerks under him in the Pension Department, and we have no question but that neither the Honorable Secretary of the Interior nor his Assistant Secretary for the Land Department read the testimony submitted in this cause nor the decision itself; the probabilities are overwhelming that this decision was written by some clerk of the Department, and when ready for signature was appended at the request of said clerk and without the signer reading a word of the same. We venture this assertion for the further reason that we have seen decisions so signed in the Land Department at Washington on several occasions, and we have no doubt some of the members of this Court personally know that this is common in said Department. We call the attention of the Court to this practice for the reason that the Honorable Secretary of the Interior whose name is appended to this opinion is an eminent lawyer, and could we believe that he read and considered the evidence submitted and thereupon gave this opinion we would entertain much more respect therefor.

In conclusion we respectfully pray this Honorable Court

to reverse the decision of the lower Court herein for the following reasons, to-wit:

1st. We were entitled under the Act of June 3, 1878, to a patent for the lands described in the entry of Henry C. Hackley immediately upon the transmission of the papers and proofs to the Commissioner of the General Land Office, said papers and proofs being regular upon their face, and no person objecting thereto having a valid claim to any portion of the land.

2nd. The Commissioner of the General Land Office is an executive officer, and had no authority in law to suspend said entry.

3rd. No officer of the Land Department of the United States, a member of the executive branch of our Government, has any authority in law to commence an action or suit in the name of the United States as plaintiff, for the purpose of cancelling or altering any contract or writing, or for the enforcement of a forfeiture, nor for any other purpose.

4th. Under the law and the decisions of this Court, said land embraced in said entry became the private property of said entryman the moment final certificate was to him issued, and he was, then and there, fully vested with the right and power to convey the same as land; he did convey, and his grantee conveyed to appellants, whereupon said land became the property of appellants, and the action of the Land Department, if authorized by act of Congress, is nevertheless unconstitutional in that such act would be an attempt to give to the Executive Department powers vested by the Constitution in the judiciary; the same would be unconstitutional

because it would be depriving a person of property without due process of law; without due process of law for the reason that the pretended tribunal has no power to compel the attendance of witnesses, has no power to compel the answer of questions, and has no power to issue attachment against the person to enforce its mandates.

5th. If Congress has attempted to confer this power upon the executive officers of the Land Department, it has attempted to do so only by sections 2450-2457 of the Revised Statutes of the United States, inclusive, and the Honorable Secretary of the Interior entirely disregarded the provisions of said law in that he considered the action favorable to appellants by the Commissioner of the General Land Office, individually, and not as a member of a board.

6th. The Government charged fraud against said entry in that said entry was made at the instance and for the benefit of said Bailey and Lohr, and upon the trial the Government introduced no evidence to substantiate that allegation; all of the entrymen and transferees of said property were justified in considering that the Government had abandoned said allegation, and said defendants would not have been justified in attempting to establish innocence, which was conclusively presumed until such innocence was attacked by evidence submitted.

7th. Fraud is a mixed question of law and fact; therefore the finding of the Land Department thereon is not conclusive upon the courts; were it a question of fact under consideration, the same would not be conclusive upon the courts where the record before the court shows an entire ab-

sence of evidence upon which to found such conclusion or finding, and such is the same shown by the Record herein.

8th. The Honorable Secretary of the Interior had no authority in law or by precedent to infer fraud, for this fraud is more than *quasi* criminal, for fraud could not have been committed in these entries only through perjury committed by said entrymen, and no tribunal has a right to find a person guilty of crime, only upon a preponderance of the evidence submitted.

9th. Appellants are protected as *bona fide* purchasers by the express provision of the act of Congress under which said entry was made; all the officers of the Land Department who have passed upon said entries have found and expressly decided that said appellants were charged with no wrong, and the evidence submitted showed no wrong on their part. Said cancellation of said entry was in direct violation of the principles laid down in the case of United States v. Budd, *supra*.

10th. The allegations of the bill of complaint filed herein are admitted by the plea and answer of defendant, excepting in so far as the questions of law are concerned and the testimony of the witnesses, said S. S. Bailey and said Henry C. Hackley, together with the exhibits filed from "A" to "D," inclusive (Record, pages 29-68, inclusive), show the legality, regularity and good faith of said entry and the several transfers thereof.

11th. Equity and good conscience demands that appellants be not deprived of their property honestly and innocently acquired at a time when the law permitted them to acquire the same, and more than four and one-half years after

the Government had sold the same, by an action brought by the Government nearly six years after the perfection of the entries.

Respectfully Submitted,

CHAS. K. JENNER,

Solicitor for Appellants.